Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak

HIGH COURT (KUALA LUMPUR) — SUIT NO WA22NCVC-181–03 OF 2016
ABU BAKAR JAIS J
28 APRIL 2017

Civil Procedure — Striking out — Application for — Plaintiffs sued defendant for tort of misfeasance in public office and/or breach of fiduciaries in public office — Defendant applied to strike out plaintiffs' suit pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 — Whether plaintiffs' action was plain and obvious to be struck out — Whether defendant was public officer — Whether common law should be applicable to interpret terms of 'public officer' and 'public office' — Civil Law Act 1956 s 3(1) — Federal Constitution art 132 — Interpretation Acts 1948 and 1967 s 3 — Rules of Court 2012 O 18 r 19(1)

The plaintiffs commenced an action against the defendant, the current Prime Minister of Malaysia for a declaration that the defendant committed the tort of misfeasance in public office and/or tort of breach of fiduciaries in public office because of interference and obstruction in the investigations pertaining to 1MDB and other related companies. In response, the defendant brought the present application to strike out the suit filed by the three plaintiffs pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('the ROC'). The issue for determination was whether the plaintiffs' action was plain and obvious for it to be struck out. In relation to this, the defendant contended that he was not a public officer; hence, the plaintiffs could not be allowed to bring the tort of misfeasance in public office against him. On the other hand, the plaintiffs submitted that the defendant had contradicted himself in his own affidavit, initially by saying that he was not a public officer but in the same affidavit asserting that the plaintiffs were trying to drive him from public office. It was therefore argued that the contradiction would mean that the issue of whether the defendant was a public officer ought to be litigated in full trial as it was a fundamental principle that for a striking out application, there could not be a minute examination of the documents. Further, the plaintiffs submitted that since common law was being relied in this action, the definition of 'public officer', 'public office' and 'government servant' should be understood in the context of common law principles while statutory or constitutional definition should take secondary role.

Held, allowing the defendant's application with costs:

(1) The defendant was not a member of any of the services listed under art 132(1) of the Federal Constitution ('the Constitution'). Article 132(3) of the Constitution lists down the offices that are to be excluded as public services, inter alia, the office of any member of the administration in the Federation or a State. By virtue of art 160(2) of the Constitution, the defendant being a Minister was a member of the administration. Further, pursuant to s 3 of the Interpretation Acts 1948 and 1967 ('the Act'), a Minister includes Prime Minister. The provisions cumulatively would indicate that the defendant was not a public officer and did not hold public office (see paras 50–51).

(2) There was contradiction on part of the defendant but this contradiction at best showed the confusion of the defendant in respect of the office and position he held. But it could never mean that the defendant was a public officer in light of the provisions explained. The confusion of the defendant and the wrong choice of words he had used could not override nor displace the clear words of the Act and Constitution as pointed out. Further it was for the court through no concession or mistake by the parties to determine whether the defendant was a public officer guided by the statutory provisions available (see para 53).

(3) There was no need to minutely examine that affidavit in respect of the contradiction as the question whether the defendant was a public officer could categorically be answered by looking at the provisions of the Act and Constitution as already highlighted and not belaboured on the contradiction in the affidavit. Even without full trial, the provisions of the Act and Constitution are quite clear in determining whether the defendant was a public officer in public office (see paras 55 & 57).

(4) Since there are already provisions in the Act and Constitution, common law should not be applicable in interpreting the terms 'public officer' and 'public office'. Section 3(1) of the Civil Law Act 1956 reinforced the application of the relevant provisions of the Act and Constitution as opposed to common law in finding the defendant was not a public officer and not in public office (see paras 58, 66 & 68–69).

(5) The important elements of 'public officer' and 'public office' not being satisfied by the plaintiffs for their action, means their claim was plain and obvious to be struck out. On the face of it, the same was also obviously unsustainable. There was actually no reasonable cause of action and as a whole, on the facts and laws explained, the claim of the plaintiffs was frivolous and vexatious (see paras 61, 65 & 71).

[Bahasa Malaysia summary

Plaintif telah memulakan satu tindakan terhadap defendan, Perdana Menteri Malaysia bagi suatu perisytiharan bahawa defendan melakukan tort misfeasans di pejabat awam dan/atau tort pelanggaran fidusiari di pejabat awam kerana

gangguan dan halangan dalam siasatan berkaitan dengan 1MDB dan syarikat-syarikat lain yang bersangkutan. Dalam balasannya, defendan mengemukakan permohonan ini untuk membatalkan saman yang difailkan oleh ketiga-tiga plaintif di bawah A 18 k 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Isu yang perlu diputuskan adalah sama ada tindakan plaintif-plaintif jelas wajar dibatalkan. Sehubungan itu, defendan menegaskan bahawa dia bukan seorang pegawai awam; oleh itu, plaintif-plaintif tidak boleh dibenarkan untuk memulakan tort misfeasans di pejabat awam terhadapnya. Sebaliknya, plaintif-plaintif menghujahkan bahawa defendan bercanggah dengan dirinya sendiri dalam afidavitnya dalam afidavitnya kerana pada mulanya beliau mengatakan mengatakan beliau bukan seorang pegawai awam tetapi dalam afidavit yang sama menegaskan bahawa plaintif-plaintif cuba mengeluarkannya dari pejabat awam. Oleh itu dihujahkan bahawa percanggahan ini bermakna bahawa isu sama ada defendan adalah pegawai awam patut dilitigasi dalam perbicaraan penuh kerana adalah satu prinsip asas bagi permohonan pembatalan dan pemeriksaan dokumen tidak boleh dijalankan dengan teliti. Seterusnya, plaintif menghujahkan bahawa oleh kerana undang-undang biasa dijadikan sandaran dalam tindakan ini, definisi 'pegawai awam', 'jawatan awam' dan 'kakitangan kerajaan' perlu difahami dalam konteks prinsip-prinsip undang-undang biasa manakala definisi berkanun atau perlembagaan perlu mengambil peranan kedua.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Defendan tidak pernah menjadi ahli mana-mana perkhidmatan yang disenaraikan di bawah perkara 132(1) Perlembagaan Persekutuan ('Perlembagaan'). Perkara 132(3) Perlembagaan menyenaraikan pejabat yang tidak termasuk dalam perkhidmatan awam, antara lain, jawatan mana-mana anggota pentadbiran dalam Persekutuan atau Negeri. Bawah perkara 160(2) Perlembagaan, defendan sebagai Menteri adalah seorang anggota pentadbiran. Selanjutnya, menurut s 3 Akta Tafsiran 1948 dan 1967 ('Akta'), seorang Menteri termasuklah Perdana Menteri. Peruntukan secara kumulatif akan menunjukkan bahawa defendan tidak adalah seorang pegawai awam dan tidak memegang jawatan awam (lihat perenggan 50–51).

(2) Terdapat percanggahan oleh defendan tetapi percanggahan ini, paling tidak, menunjukkan kekeliruan defendan berkenaan pejabat dan jawatan yang dipegang. Tetapi ini tidak bermakna defendan adalah seorang pegawai awam berdasarkan peruntukan yang dijelaskan. Kekeliruan defendan dan pilihan kata-kata yang salah digunakan tidak boleh mengatasi atau menggantikan kata-kata yang jelas Akta dan Perlembagaan yang dinyatakan. Tambahan lagi, mahkamah berperanan, tidak bawah mana-mana konsesi atau kesilapan pihak-pihak untuk menentukan sama ada defendan seorang pegawai awam berpandukan peruntukan undang-undang yang ada (lihat perenggan 53).

(3) Tiada keperluan untuk memerika afidavit tersebut dengan teliti berkenaan percanggahan tentang soalan sama ada defendan seorang pegawai awam boleh dijawab dengan melihat pada peruntukan Akta dan Perlembagaan seperti yang diketengahkan dan tidak dikecam bagi percanggahan dalam afidavit. Walaupun tanpa perbicaraan penuh, peruntukan Akta dan Perlembagaan cukup jelas dalam menentukan sama ada defendan seorang pegawai awam di pejabat awam (lihat perenggan 55–57).

(4) Memandangkan terdapat peruntukan dalam Akta dan Perlembagaan, undang-undang yang sama tidak boleh diguna pakai dalam mentafsir terma 'pegawai awam' dan 'jawatan awam'. Seksyen 3(1) Akta Undang-Undang Sivil 1956 menguatkan permohonan peruntukan yang berkaitan dalam Akta dan Perlembagaan, bertentangan dengan undang-undang biasa dalam memutuskan defendan bukan seorang pegawai awam dan tidak dalam pejabat awam (lihat perenggan 58, 66 & 68–69).

(5) Unsur-unsur penting dalam 'pegawai awam' dan 'jawatan awam' yang dipenuhi oleh plaintif dalam tindakan mereka, bermakna tuntutan mereka jelas dan nyata wajar dibatalkan. Pada zahirnya, ia juga jelas tidak mapan. Sebenarnya tidak terdapat kausa tindakan yang munasabah dan secara keseluruhan, berdasarkan fakta dan undang-undang yang dinyatakan, tuntutan plaintif remeh dan menyusahkan (lihat perenggan 61, 65 & 67).]

Notes

For cases on application for striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9281–9311.

Cases referred to

Bahamas International Trust Co Ltd v Threadgold [1974] 1 WLR 1514, HL (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Florencio Marin and Jose Coye v Attorney General of Belize [2011] CCJ 9 (AJ), CA (refd)

LBCN Development Sdn Bhd & Anor v Pengarah Tanah dan Galian Selangor & Ors [2014] 3 MLJ 445; [2014] 3 CLJ 970, CA (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)

MBF Capital Bhd & Anor v Dato' Param Cumaraswamy [1997] 3 MLJ 300, HC (refd)

Mohd Khir bin Toyo v PP [2015] 5 MLJ 429; [2015] 8 CLJ 789, FC (refd)

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101, CA (refd)

Three Rivers District Council and others v Bank of England (No 3) [2001] 2 All ER 513, HL (refd)

Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak [2016] 11 MLJ 1; [2016] 7 CLJ 637; [2016] 6 MLRH 159, HC (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Federal Constitution arts 132(1), (3), 160(2)
Interpretation Acts 1948 and 1967 ss 3, 8(2), 66
Malaysian Anti-Corruption Commission Act 2009 s 3
Members of Parliament Remuneration Act 1980 s 6(1), 6(1)(a)
Penal Code s 21(i)
Rules of Court 2012 O 18 r 19(1)(a), (b), (c), (d), O 33 r 3

Haniff Khatri (Muhammad Rafique, Ahmad Razlan Che Kassim, and Ilyani bt Noor Khuszainywith him) (Haniff Khatri) for the plaintiffs.

Cecil Abraham (Wira Mohd Hafarizam Harun, Rishwant Singh a/l Amarjeet Singh, Norhazira Abu Haiyan and Iqmar Shafiq with him) (Hafarizam Wan & Aisha Mubarak) for the defendant.

Abu Bakar Jais J:

INTRODUCTION

[1] This written judgment relates to the application of the defendant to strike out the suit filed by the three plaintiffs pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('the RC').

BACKGROUND FACTS

[2] I had already narrated the material facts of this case in my written judgment pertaining to an earlier application by the plaintiffs to cross-examine the defendant as reported in *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2016] 11 MLJ 1; [2016] 7 CLJ 637; [2016] 6 MLRH 159. These facts are still relevant and are reproduced below.

[3] The first plaintiff is the former Prime Minister of Malaysia of 22 years. The second and third plaintiffs, like the first plaintiff are former members of United Malays National Organisation ('UMNO'), the main political party in a coalition forming the present government.

[4] The defendant is the current and sixth Prime Minister of Malaysia. He is

also the President of UMNO and Chairman of Barisan Nasional ('BN'), the coalition.

[5] All three plaintiffs are up in arms against the defendant for alleged financial improprieties in a company wholly owned by the Government of Malaysia, 1Malaysia Development Bhd ('1MDB'). From their statement of claim, it is indicative that they subscribe to this belief because of initial news reports from among others, *Sarawak Report* and *Wall Street Journal* regarding these alleged wrongdoings and other events happening subsequently to their understanding, lending credence to that belief.

[6] The defendant is the Chairman of the Board of Advisors of 1MDB. The allegation among others is that at least the amounts of RM2.6 billion and RM42m went into the personal bank accounts of the defendant from SRC International Sdn Bhd, a subsidiary of 1MDB without any justification whatsoever.

[7] The former Attorney General of Malaysia ('AG') subsequently headed a task force investigating the alleged fund transfer into the personal bank accounts of the defendant. The members of the task force include the former governor of the central bank, the head of the police force and head of the Malaysian Anti-Corruption Commission.

[8] Events ensued later with the termination effectively of the service of the former AG from his post in the midst of the investigation. In addition, four members of Parliament's Public Accounts Committee ('PAC') also investigating 1MDB were appointed to the cabinet, thus disqualifying them as members and affecting tremendously the said investigation by PAC.

[9] The plaintiffs make the allegation all these were orchestrated by the defendant as Prime Minister. The defendant is said to interfere and halt the investigation by using his office and power as the Prime Minister.

[10] The statement of claim of the plaintiffs also makes allegation that the government machinery was used to harass and intimidate those who are critical of 1MDB and the defendant. These include taking actions against news agencies such as the Edge Media Group for allegations of inaccurate reports pertaining to 1MDB. It is also alleged members of the opposition critical of the defendant and 1MDB had been banned for overseas travel without reasons. Further the then Deputy Prime Minister, Tan Sri Muhyiddin Hj Mohd Yassin ('TS Muhyiddin') who had allegedly demanded the defendant to come clean on 1MDB was also removed from his post. Also dismissed was Minister of Rural and Regional Development, Dato Seri Hj Mohd Shafie bin Hj Apdal ('DS Mohd Shafie') who publicly called on the defendant to explain the

purported financial scandal of 1MDB. All these too are alleged by the plaintiffs to be attributable to the defendant as Prime Minister.

[11] The statement of claim of the plaintiffs asserts that all three have the right to bring action against the defendant on the tort of misfeasance in public office and/or tort of breach of fiduciaries in public office. In fact, the plaintiffs state that they are bringing this action against the defendant in his personal capacity for committing both torts.

[12] The prayers sought by the plaintiffs from this court include a declaration that the defendant committed the tort of misfeasance in public office and/or tort of breach of fiduciaries in public office because of interference and obstruction in the investigations pertaining to 1MDB and other related companies. Also sought is that the defendant pays the amount RM2.6 billion as exemplary damages and the amount RM42m as aggravated damages to the Government of Malaysia.

THE DEFENDANT'S SUBMISSIONS

[13] In gist, the arguments of the defendant supporting his application for striking out are as follows.

[14] The first point contended by the defendant is that the plaintiffs' claim is devoid of particulars pertaining to the instructions allegedly given by the former to the government machinery including government ministries and enforcement agencies pertaining to the allegation of conspiracy on the part of the defendant.

[15] The second argument of the defendant is that there is no reasonable cause of action, scandalous, frivolous and an abuse of the process of the court for the plaintiffs to allege against the defendant the tort of misfeasance in public office.

[16] For this tort, too the defendant's contended that the plaintiffs failed to fulfil the ingredients of the tort. The perusal of the statement of claim of the plaintiffs according to the defendant showed that all the ingredients for the tort of misfeasance in public office has not and cannot be satisfied.

[17] The defendant in this regard submitted that the plaintiffs must prove that the offices of the Prime Minister and Minister of Finance of Malaysia in which the defendant also occupies, Chairman of BN or President of UMNO are all public offices in proving this tort. Consequently, the plaintiffs need to prove that the defendant must be a public officer before the tort of misfeasance in public office can be established. In this regard the defendant maintained that

he is not a public officer and therefore cannot be liable for the tort of misfeasance in public office.

[18] The defendant also argued that there is no pleaded loss by the plaintiffs. Not only there is no pleaded loss by the plaintiffs, the plaintiffs also failed to show how the loss to the plaintiffs was caused by the defendant exercising his power as a public officer.

[19] The defendant further contended the act of the public officer must fall either in the targeted malice limb of misfeasance where he acts with intent to harm any one or more of the plaintiffs or the illegality limb of misfeasance where he knows that the act is unlawful and that it would probably injure the plaintiffs. The defendant submitted there is no such pleaded acts against the defendant.

[20] The defendant contended too that there is no fiduciary duty owed by him as the Prime Minister, Minister of Finance, Chairman of BN and President of UMNO to the plaintiffs. There is no mutual trust and confidence placed between the parties for a fiduciary relationship to exist.

[21] Besides the plaintiffs did not plead the circumstances upon which this relationship is established. Therefore, the defendant contended the plaintiffs' action does not disclose a cause of action and should be struck out.

[22] Also the defendant submitted that the plaintiffs' action is filed for a collateral and an ulterior purpose and this is an abuse of the process of this court. It is founded purely on political purpose to drive the defendant from the government.

[23] Further, the defendant argued that the plaintiffs' action cannot be allowed to stand on general and vague allegations in the hope that the plaintiffs can reconstitute and make good their case later. The case of the plaintiffs must be based on facts and not inferences and the pleading tends to prolong the process of a needless trial.

THE PLAINTIFFS' SUBMISSIONS

[24] In summary, the contentions of the plaintiffs resisting the defendant's application are narrated below.

[25] Citing the decision of the House of Lords in *Three Rivers District Council and others v Bank of England (No 3)* [2001] 2 All ER 513, the plaintiffs are not disputing that the first ingredient of the tort of misfeasance in public office is that a defendant must be a public officer. The second ingredient is the

exercise of power by a public officer. The third ingredient concerns the state of mind of the defendant. This is divided into two. First there is targeted malice by a public officer. Second is where the public officer acts knowing he has no power to act and the act will probably injure the plaintiff. These ingredients according to the plaintiffs are not cast in stone. Hence, the plaintiffs argued that the law for the tort of misfeasance in public office is still developing.

[26] The plaintiffs also cited the Court of Appeal's case of *LBCN Development Sdn Bhd & Anor v Pengarah Tanah dan Galian Selangor & Ors* [2014] 3 MLJ 445; [2014] 3 CLJ 970 for this tort which essentially reaffirmed the principles of *Three Rivers*.

[27] The plaintiffs further contended the matters for them to prove for this tort of misfeasance in public office are as follows:

(a) that the defendant is in public office;

(b) that there is a deliberate and dishonest wrongful abuse of the power by the defendant given to him in his capacity in the public office;

(c) that such deliberate and dishonest wrongful abuse of the power was made with bad intention (malice), and in any event, whether the element of malice is even relevant in the context of the plaintiffs' pleaded causes of action; and

(d) that the plaintiffs or a person in the plaintiffs' class suffered or would in all likelihood suffer from such deliberate and dishonest wrongful abuse of power by the defendant.

[28] For the first ingredient, to prove the defendant is in public office the plaintiffs referred to the affidavit of the defendant to support the application for striking-out. The plaintiffs argued in this affidavit it can be seen that the defendant had contradicted himself. On one hand, he had said he is not a member of the public service or a public officer but on the other, he did indicate that the plaintiffs are trying to oust him from public office.

[29] In this regard the plaintiffs contended that one fundamental principle on striking out is that it cannot be based on a minute examination of the documents. Further when there is a point of law that requires serious discussion, objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the RC. The contradiction involves question of law as to whether the defendant holds public office and therefore is a public officer. Since there is contradiction, this should be decided in a full trial as it cannot be decided by a minute examination of the defendant's affidavit.

[30] The plaintiffs further contended the terms 'public office', 'public

officer' and 'government servant' must be construed on common law principles and not so much on statutes or constitutional definitions. When there is a conflict common law should apply.

[31] The acts of the defendant also border on criminal wrongs despite the plaintiffs' suit presently is civil in nature. The misuse of power should be taken in context with the criminal breach that is apparent in the actions of the defendant. The definition of 'Public Servant' in the Penal Code would mean that the defendant would still be liable for the tort of misfeasance in public office. Likewise s 6(1) of the Members of Parliament Remuneration Act 1980 ('the MPRA') provides for the remuneration of the defendant by the Legislature, thus the defendant is a public servant.

[32] The provisions of the Interpretation Acts 1948 and 1967 ('the IA') and the Malaysian Anti-Corruption Commission Act 2009 ('the MACCA') would also suggest that the defendant is a public officer. The case of *Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429; [2015] 8 CLJ 789 is also an authority that the defendant should similarly be held to be a public servant.

[33] For the second ingredient, the plaintiffs further submitted that the pleading of the plaintiffs is clear to indicate a deliberate and dishonest wrongful abuse of power by the defendant given to him in his capacity in public office. The pleading must be taken to be true at least at this stage before full trial. There is also evidence to suggest after the filing of the suit, the abuse of power by the defendant including events transpiring in the United States on the issue of the remittance of the moneys of 1MDB.

[34] In respect of the third ingredient, the plaintiffs also contended whether wrongful abuse of power by the defendant were made with intention (malice) and whether the element of malice is even relevant to be considered in the context of the plaintiffs' pleaded case is to be proven during full trial. Before trial, this court should only be concerned with what is pleaded. And indeed the plaintiffs submitted that they had pleaded malice and bad intentions repeatedly in the statement of claim.

[35] In respect of the fourth ingredient pertaining to the plaintiffs or a person in the plaintiffs' class suffering the abuse, the plaintiffs contended that they had indeed particularised the direct effect and injury suffered by the them due to the abuse of process by the defendant. The fact there is injury to the 'high principle in public law' should also be sufficient to denote the satisfaction of this ingredient. There is no need to show that a third person had actually suffered the injury because of the abuse.

[36] In respect of the cause of action that the defendant owes fiduciary duties

to the plaintiffs and Malaysians at large, the plaintiffs argued that this court ought to be the 'supreme policing authority' and that the Federal Constitution forms the basis for the plaintiffs cause of action in this regard. It is also argued that the defendant holds office under the Federal Constitution as fiduciary to the Federation for the benefit of all Malaysians including the plaintiffs. In any event, it is submitted that whether there is a valid cause of action should be determined after full trial.

[37] The plaintiffs also submitted that they have the locus standi to sue the defendant. Locus standi is established when the plaintiffs attempt to uphold the Federal Constitution. Public interest litigation cannot be denied simply because the plaintiffs do not have a direct interest in the matter.

THE COURT'S FINDINGS

[38] First, it must always be borne in mind that this is still the basic and normal application to strike out the plaintiffs' suit. It is after all requested at an early stage. Of course, no witnesses have been called in view of the present application. However, that in no way would mean that the application does not deserve its due consideration.

[39] In this regard it is common knowledge there is a plethora of decided cases on application for a striking out of an action. However suffice to note there can be no dispute that all parties should be guided by the leading case of the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 when it comes to an application to strike out an action. The relevant and oft-quoted words of the decision are as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7*, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co 8)*. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence.
>
> ...
>
> The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[40] As seen five crucial factors that are taken into account in considering whether an action is to be struck out as stated in the above quotation are as follows:

(a) it must be plain and obvious that a suit can be struck out;

(b) a claim on the face of it is obviously unsustainable;

(c) it cannot be exercised by a minute examination of the documents and facts of the case;

(d) there is no reasonable cause of action; and

(e) the claim is frivolous or vexatious.

[41] I shall base my decision for the present application on the above requirements as after all *Bandar Builder* is binding on this court.

[42] Second, it is undisputed by the plaintiffs themselves and in fact they asserted there are two causes of action forwarded by them as follows:

(a) tort of misfeasance in public office by the defendant; and

(b) breach of fiduciaries in public office by the defendant.

[43] Coming back to *Bandar Builder*, the first question to ask is whether the plaintiffs' action is plain and obvious for it to be struck out. I shall approach this issue by alluding firstly to the first cause of action of the plaintiffs ie misfeasance in public office by the defendant and then to the second cause of action ie breach of fiduciaries in public office by the defendant.

[44] For the first cause of action, following *Three Rivers District Council*, a crucial ingredient for the tort needed is that the defendant must be proven to be a public officer. This is undisputed even by the plaintiffs. As stated the defendant argued that he is not a public officer. Therefore the defendant contended that the plaintiffs cannot be allowed to bring the tort of misfeasance in public office against him.

[45] For this contention, I state the reliance of the defendant firstly on s 3 of the IA as follows:

> 'public office' means an office in any of the *public services*;
>
> 'public officer' means *a person lawfully holding, acting in or exercising the functions of a public service*.
>
> 'public services' means the public services mentioned in Article 132 (1) of the Federal Constitution.
>
> 'Minister' means, subject to subsection 8(2), a Minister of the Government of Malaysia (including the Prime Minister and a Deputy Minister).
>
> (Emphasis added.)

[46] Also s 8(2) of the IA states:

A reference to 'the Minister' is a reference to the Minister for the time being responsible for the matter in connection with which the reference is made.

[47] In turn art 132(1) of the Federal Constitution states:

For the purposes of this Constitution, the public services are —

(a) the armed forces;

(b) the judicial and legal service;

(c) the general public service of the Federation;

(d) the police force;

(e) *(repealed)*;

(f) the joint public services mentioned in Article 133;

(g) the public service of each State; and

(h) the education service.

[48] And art 132(1) of the Federal Constitution states:

The public service shall not be taken to comprise —

(a) the office of any member of the administration in the Federation or a State; or

(b) the office of President, Speaker, Deputy President, Deputy Speaker or member of either House of Parliament or of the Legislative Assembly of a State; or

(c) the office of judge of the Federal Court, the Court of Appeal or a High Court; or

(d) the office of member of any Commission or Council established by this Constitution or any corresponding Commission or Council established by the Constitution of a State; or

(e) such diplomatic posts as the Yang di-Pertuan Agong may by order prescribe, being post which but for the order would be posts in the general public service of the Federation.

[49] Also art 160(2) of the Federal Constitution states:

In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say —

Member of the administration' means, in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary or Political Secretary and, in relation to a State, a person holding a corresponding office in the

State or holding office as member (other than an official member) of the Executive Council.

[50] First, the terms 'public office' and 'public officer' are defined as shown above in s 3 of the IA. Both these terms are important because the two causes of action brought by the plaintiffs involved proving these terms. The terms need to be proven to show that indeed the defendant firstly is a public officer and secondly he is in public office. Coming back to the definitions, as stated the common denominator in respect of both is '*public service(s)*' (see the definitions in s 3 of the IA shown above). Therefore, it must be shown and proven that the defendant must be a member of the public service. For this, as shown also by the same provision of the IA *'public services'* are limited to the services stated only in art 132(1) of the Federal Constitution. This provision of the Federal Constitution is also shown above. Clearly, the defendant is not a member of any of the services listed under this provision of the Federal Constitution. To reinforce this finding, one only need to look at art 132(3) of the Federal Constitution, which is also shown above. This provision lists down the offices that are to be excluded as public services. One of which is the office of any member of the administration in the Federation or a State. And who is the member of administration? It includes the defendant by virtue of art 160(2) of the Federal Constitution, which is also narrated above for being a Minister. And a Minister includes Prime Minister as seen in the definition of 'Minister' in s 3 of the IA shown above.

[51] These provisions cumulatively will indicate that the defendant is not a public officer and does not hold public office. It may be most surprising and quite unpalatable to swallow for many on the streets that the defendant in his capacity as Prime Minister or Minister of Finance is not a public officer in public office. But the provisions highlighted clearly indicate our Legislature in their wisdom had thought it fit and proper not to categorise the defendant as a public officer. It is most cliché to stress a court should decide a case based only on the law applicable no matter how unpopular the judge might become because of the decision. And in this regard it is trite that a court of law should not usurp the function of the Legislature by imposing its own words or ingeniously interpreting and stretching the clear words of the provisions to say the defendant is a public officer in public office instead. This proposition is explained by the Federal Court in the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 as follows:

> It is clear that the question at issue is fraught with political controversy. No doubt the appellant and other persons hold strong views one way or the other on the justice of the impugned Act. I should add that right now no feature of our system of government has caused so much discussion, received so much criticism, and been so frequently misunderstood, than the duties assigned to the courts and the functions which they discharge in guarding the Constitution. For that reason and also because

it is rarely that this court is faced with a constitutional question of this kind it is desirable at the outset to make clear the functions of the courts.

The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at p 118:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction' — per Roskill LJ in *Henry v Geopresco International Ltd* [1975] 2 All ER 702 at p 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Legislature, and not the courts; they have their remedy at the ballot box.

The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modem terms that we are a government of laws, not of men.

[52] The issue whether the defendant is a public officer would not be sufficiently addressed if I do not allude to the contentions of the plaintiffs in greater detail in respect of the same. I therefore do so in the ensuing paragraphs.

[53] First is the contention that the defendant had contradicted himself in this regard in his own affidavit, initially by saying he is not a public officer but in the same affidavit asserting that the plaintiffs are trying to drive him from public office. I accept there is a contradiction on the part of the defendant under the circumstance. But what is the real effect of this contradiction? Can this contradiction be taken to mean that the defendant is a public officer? I am

not prepared to rule so because of the clear provisions of the IA and the Federal Constitution, which have been alluded earlier. This contradiction at best shows the confusion of the defendant himself in respect of the office and position he hold. But it can never mean that the defendant is a public officer in light of the provisions explained. The confusion of the defendant and the wrong choice of words he had used cannot override nor displace the clear words of the IA and Federal Constitution as pointed out. Further it is for the court through no concession or mistake by the parties to determine whether the defendant is a public officer guided by the statutory provisions available. In this regard it is appropriate to take note of the decision in *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514 where it is said:

> In a case which turns, as this one does, on the construction to be given to a written documents' a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

[54] The above decision is already adopted by our Court of Appeal in *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101.

[55] The plaintiffs also argued that the contradiction would mean that the issue whether the defendant is a public officer ought to be litigated in a full trial as it is a fundamental principle that for a striking out, there cannot be a minute examination of the documents. Here the plaintiffs basically suggested there cannot be a minute examination of the contradiction as contained in the defendant's affidavit. On this, respectfully I would say there is no need to minutely examine that affidavit in respect of the contradiction as the question whether the defendant is a public officer can categorically be answered by looking at the provisions of the IA and Federal Constitution as already highlighted and not belabour on the contradiction in the affidavit. Neither would the argument of the plaintiffs be applicable in this respect if it was to be contended there should not be a minute examination of the statement of claim or defence. Either in respect of the affidavit or pleadings, there is no need to minutely examine both in determining whether the defendant is a public officer in public office.

[56] The plaintiffs then cited the case of *MBF Capital Bhd & Anor v Dato' Param Cumaraswamy* [1997] 3 MLJ 300 to argue that in this case of

defamation, a striking out was refused because whether the defendant in this case enjoyed immunity from legal process as United Nations Special Rapporteur can only be answered in a full trial. That may be so in the finding of the court in that case because obviously the court in that case had no benefit of clear statutory provisions as in the IA and Federal Constitution as explained for the present case before this court now. In short, each case has its own peculiar facts, so much so no two cases can be decided similarly without first appreciating its different facts.

[57] The plaintiffs went on to say that the facts and principle of *MBF Capital Bhd* are similar with the present case as it would also be too elusive an inquiry to determine whether the defendant is a public officer without a full trial. I respectfully do not agree these two cases have similar relevant facts. It maybe too elusive an inquiry to determine whether the defendant was protected with immunity without full trial in *MBF Capital Bhd*. However, because of the clear provisions of the IA and Federal Constitution as explained, it is never an elusive inquiry to determine whether the defendant in the present case is a public officer without full trial. Even without full trial, the provisions of the IA and Federal Constitution are quite clear in determining whether the defendant is a public officer in public office.

[58] On a slightly different note from the above arguments pertaining to the contradiction of the defendant, the plaintiff also contended that since common law is being relied for this tort, the definitions of 'public officer', 'public office' and 'government servant' should be understood in the context of common law principles while statutory or constitutional definition should take secondary role being persuasive at best. With respect, I find this contention disturbing to say the least. The effect of this submission in essence is to suggest that this court should discard or the very least close one eye so to speak to allow common law interpretations instead of applying the clear provisions of the IA and Federal Constitution to determine whether the defendant is a public officer. I see no reason to do that because we have our own legislation over and above the English common law.

[59] The plaintiffs next contention in respect of the issue whether the defendant is a public officer involves the definition of 'public servant' pursuant to s 21(i) of the Penal Code where it states that 'public servant' denotes '... every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty'. In this regard the plaintiffs submitted than since the remuneration of the defendant as Prime Minister is provided by the Legislature pursuant to s 6(1)(a) of the MPRA, the defendant is a public servant. The plaintiffs further argued this is consistent with the definition of 'public officer' under s 66 of the IA which provides that 'public officer' means a person in the permanent or temporary employment of

any Government in the Federation and s 3 of the MACCA that defines 'officer of a public body' as to mean, inter alia, 'any person receiving any remuneration from public funds'. The plaintiffs supported these submissions with the case of the Federal Court in *Mohd Khir Toyo* where the accused in that case in his capacity as Chief Minister of Selangor and Chairman of Perbandaran Negeri Selangor was held to be a public servant. First, respectfully the plaintiffs with these submissions diverted the issue of whether the defendant is a 'public officer' into whether the same is a 'public servant'. I take it that this is done because of the cumulative readings of the provisions of the IA and the Federal Constitution as explained clearly denote that the defendant is not a 'public officer'. The difference between the two posts seems semantic in nature. Though it may appear semantic, a major part of the duties of a court of law among others is precisely to interpret the differences and nuances of words. The defendant must also not be deprived of the right to consider himself not a public officer in his capacity as Prime Minister and Minister of Finance because of the provisions of IA and Federal Constitution as earlier explained. Further, the plaintiffs themselves do not dispute that the defendant must be proven to be a public officer in public office. Therefore it is not a question of being a public servant but a question of being a public officer. Besides the case *Mohd Khir Toyo* did not in its entirety discuss the question whether the accused in that case was a 'public officer'. Instead, it discussed whether the accused was a 'public servant'. The plaintiffs also quoted s 66 of the IA and s 3 of the MACCA in isolation without taking note of the provisions of the Federal Constitution as explained especially when there is no dispute that the latter is the supreme law of the land.

[60] Further, it cannot be seriously argued by the plaintiffs that the defendant is a public officer as Chairman of BN and President of UMNO. Having leadership positions in these two political bodies certainly cannot mean the defendant is a public officer nor does anyone in these bodies as ordinary members.

[61] The explanation on the finding that has been made above in respect of the first necessary ingredient for the tort of misfeasance in public office, is sufficient to determine whether the case of the plaintiffs in respect of their first cause of action is plain and obvious to be struck out. Since the plaintiffs themselves conceded that the first ingredient they need to prove is that the defendant is a public officer and since this was not proven as explained, it follows that this cause of action is plain and obvious for a striking out. A full trial is unnecessary as even if the case proceeded for full hearing, the fact remains this crucial ingredient will not be proven by the plaintiffs having regard to the provisions of the IA and Federal Constitution as explained and alluded earlier.

[62] The finding above on the first ingredient for the tort of misfeasance in public office, makes it also unnecessary and pointless to discuss and determine whether there is sufficient basis to also rule on the other ingredients for this tort. Whether the plaintiffs have the possibility to prove the other ingredients of the same tort if a full trial is allowed becomes academic since the defendant cannot in the first place be proven to be a public officer in public office. It also means the other issues raised by the defendant in challenging the pleading of the plaintiffs especially in the need of particularisation of the allegations become equally unnecessary to decide.

[63] I shall now consider whether it is plain and obvious that the second cause of action brought by the plaintiffs should also be struck out. Is there sufficient basis to say that the cause of action of breach of fiduciaries in public office by the defendant should also be determined similarly and suffer the same fate as the first cause of action brought by the plaintiffs in respect of the striking out?

[64] First in respect of this cause of action, broadly the grounds for striking out by the defendant are as follows:

(a) this is not a proper cause of action; and

(b) the plaintiffs have no legal standing to bring this particular claim.

[65] In respect of the first ground above, the argument of the defendant extended beyond the issue of whether the defendant in the first place is in public office. However I am of the view the core issue whether the defendant is in public office is still material for this cause of action as the basis for the suit is 'breach of fiduciaries in public office'. By the name of the cause of action itself, the element of 'public office' is crucial to be proven. And as explained, the defendant is not in public office bearing in mind the relevant provisions of the IA and Federal Constitution. Therefore, in failing to show that the defendant is in public office alone, means this cause of action cannot be proven against the defendant. This is indicative enough to say that the plaintiffs' case is plain and obvious to be struck out even without considering whether this is not a proper cause of action in a broader sense as argued by the defendant and whether the plaintiffs have no legal standing to bring this particular claim. It is an exercise in futility to determine these two points of contention by the defendant when the very essence of this cause of action that the defendant is in public office cannot be proven by the plaintiffs.

[66] The plaintiffs also relied on the decision by the Caribbean Court of Justice in *Florencio Marin and Jose Coye v Attorney General of Belize* [2011] CCJ 9 (AJ) to say under common law a Minister serving in a ministerial office is indeed in public office. With regard to this contention, clearly with respect the

plaintiffs failed to appreciate, in this case there is no definition of the word 'public office' as in our IA which has been highlighted. The word 'public office' in the IA has also been elaborated in the context of our own Federal Constitution as explained. The above case cannot be applied and followed as the finding in that case in respect of 'public office' flies in the face of the provisions of our IA and Federal Constitution as narrated. In the context of proving this cause of action, it again ought to be reminded, when the law is clear in our own jurisdiction as reflected in the provisions of the IA and Federal Constitution, it is difficult to fathom why must foreign law be imported to interpret the relevant terms and in the process displacing our own law.

[67] Both parties had also addressed this court on the applicability of s 3(1) of the Civil Law Act 1956 ('the CLA') in relation to the two causes of action as basis for the plaintiffs' suit. The provision states:

> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) In Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> (b) In Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) In Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii).
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[68] Having had the benefit of the submissions of both sides, I am of the view that this provision reinforced the application of the relevant provisions of the IA and Federal Constitution as opposed to common law in finding the defendant is not a public officer and not in public office. This is so having regard to the opening words of s 3(1) of the CLA that states:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall ...

[69] The qualification imposed on the applicability of common law by the above opening words indicates the same would not be applicable when there is already provisions made in respect of a particular matter. Likewise in this case, since there are already provisions in the IA and Federal Constitution as

explained, common law should not be applicable in interpreting the terms 'public officer' and 'public office'.

CONCLUSION

[70] The two important elements of the defendant being a 'public officer' and in 'public office' for both causes of action as basis for their suit cannot be proven by the plaintiffs. Our own legislative provisions must come as first preference in interpreting whether the defendant is a public officer in public office. It cannot come secondary after the common law, even though arguments may be forwarded that the common law is to elaborate and clarify the applicability of the legislative provisions. Or even to the extent that common law should be applied above the legislative provisions. There is no need for such elaboration and clarification or preference for common law, when as shown the provisions of the IA and the Federal Constitution are crystal clear.

[71] Therefore, *Bandar Builder*'s five factors as narrated are satisfied for the striking out be it cumulatively or separately. The important elements of 'public officer' and 'public office' not being satisfied by the plaintiffs for their action, means their claim is plain and obvious to be struck out. On the face of it, the same is also obviously unsustainable. Further, there is no need for a minute examination of the documents and facts of the case to strike out the plaintiffs' action as it is basic and fundamental for the two elements of 'public officer' and 'public office' be shown to apply in respect of the defendant. Therefore, for the suit brought by the plaintiffs, there is actually no reasonable cause of action and as a whole, on the facts and laws explained, the claim of the plaintiffs is frivolous and vexatious. For the last two of these factors of *Bandar Builder*, it may seem strange that there is no reasonable cause of action and the claim is frivolous and vexatious. However if one bears in mind the fact that the two important elements for both causes of action are not present, it would not be difficult to accept that indeed the plaintiffs' claim is without reasonable cause of action and is frivolous and vexatious.

[72] There may be strong reasons for the plaintiffs to bring this action against the defendant. There may also be millions who would support and understand why the plaintiffs are suing the defendant. But for all and sundry, it is fundamental to appreciate a suit can only stand based on the law that is applicable. Our own law as explained, no matter how unreasonable it may be perceived, does not permit the plaintiffs' suit. The application of the defendant for striking out of the plaintiffs' action is therefore allowed with costs to the former.

Defendant's application allowed with costs.

Reported by Dzulqarnain Ab Fatar